

3-13-2015

Gallegos v. State Respondent's Brief Dckt. 42009

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Gallegos v. State Respondent's Brief Dckt. 42009" (2015). *Not Reported*. 1885.
https://digitalcommons.law.uidaho.edu/not_reported/1885

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

ANDY GENE GALLEGOS,)	
)	No. 42009
Petitioner-Appellant,)	
)	Cassia Co. Case No.
vs.)	CV-2013-1130
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CASSIA**

**HONORABLE MICHAEL R. CRABTREE
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**ANDY GENE GALLEGOS
IDOC #26591
ISCI Medical Annex
PO Box 14
Boise, ID 83707**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

**TED S. TOLLEFSON
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
RESPONDENT**

**PRO SE
PETITIONER-APPELLANT**

FILED - COPY

MAR 23 2015

Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of Facts and Course of Proceedings	1
ISSUE	5
ARGUMENT	6
The District Court Properly Dismissed The Petition As Successive	6
A. Introduction.....	6
B. Standard Of Review	6
C. Gallegos Waived Any Appellate Challenge To The District Court’s Order By Failing To Present Authority As To Why His Petition Is Not Barred As Successive	6
D. Gallegos’ Petition Was Properly Dismissed As Successive	7
CONCLUSION	9
CERTIFICATE OF MAILING.....	9

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Detrich v. Ryan</u> , 740 F.3d 1237 (9th Cir. 2013)	4
<u>Gallegos v. Idaho</u> , Docket No. 40481	1
<u>Gilpin-Grubb v. State</u> , 138 Idaho 76, 57 P.3d 787 (2002).....	6
<u>Griffin v. State</u> , 142 Idaho 438, 128 P.3d 975 (Ct. App. 2006)	7
<u>Martinez v. Ryan</u> , 132 S.Ct. 1309 (2012).....	4
<u>Murphy v. State</u> , 156 Idaho 389, 327 P.3d 365 (2014)	3
<u>Rios-Lopez v. State</u> , 144 Idaho 340, 160 P. 3d 1275 (Ct. App. 2007).....	8
<u>State v. Green</u> , 156 Idaho 722, 330 P. 3d 1080 (Ct. App. 2014)	8
<u>State v. Zichko</u> , 129 Idaho 259, 923 P.2d 966 (1996)	6
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007)	6
 <u>STATUTES</u>	
I.C. § 19-4902	8
I.C. § 19-4908	3, 4, 7
 <u>RULES</u>	
I.R.E. 503	2

STATEMENT OF THE CASE

Nature of the Case

Andy Gene Gallegos appeals from the summary dismissal of his successive post-conviction petition.

Statement of Facts and Course of Proceedings

The state charged Gallegos with two counts of sexual abuse of minor under sixteen years of aged. (R., p. 83.) A jury found Gallegos guilty of both counts. (R., pp. 3, 83.) After trial, Gallegos admitted to being a persistent violator. (R., p. 83.) Gallegos was sentenced then he appealed. (Id.) In an unpublished decision the Court of Appeals affirmed the judgment and sentence. (R., pp. 83-84); see also Idaho Court of Appeals 2009 Unpublished Opinion, No. 613, Docket. No. 35324.

Gallegos filed an application for post-conviction relief in Cassia County case CV-2010-757. (Id.) He asserted multiple claims of ineffective assistance of both trial and appellate counsel. (Id.) The district court granted the state's motion for summary dismissal. (Id.) Gallegos appealed. See Gallegos v. Idaho, Docket No. 40481. This appeal was dismissed and remittitur issued. Id.

On December 20, 2013 Gallegos filed a Successive Petition for Post-Conviction Relief. (R., pp. 3-7.) Gallegos alleged that he had a sufficient reason to file a successive petition because his first post-conviction counsel was ineffective. (R., p. 6.)

In his successive petition Gallegos alleged three claims, Claim 1 – Ineffective Assistance of Post-Conviction Relief Counsel (R., pp. 26-30); Claim 2

– Ineffective Assistance of Trial Counsel (R., pp. 31-35); and Claim 3 – Ineffective Assistance of Appellate Attorney (R., pp. 36-40.) The state filed an Answer to Gallegos' successive petition. (R., pp. 48-52.)

Gallegos moved for appointment of counsel. (R., pp. 14-18.) The district court denied Gallegos' motion for appointment of counsel. (R., pp. 41-47.) The district determined that Gallegos did "not raise the possibility of valid claims for post-conviction relief." (R., pp. 43-44.) The district court explained:

Mr. Gallegos contends that his trial attorney, David Haley (hereafter "Mr. Haley"), provided ineffective assistance of counsel by "failing to ask the trial court to conduct an in camera proceeding with Dr. Brek Pilling's patient inquiring into her knowledge of anything related to [Mr. Gallegos's] case." (Gallegos Aff. Attach. A at 6.) Similarly, Mr. Gallegos contends that his attorneys on the direct appeal provided ineffective assistance of counsel by failing to argue (1) "that the district court had abused its discretion in not conducting a [sic] in camera proceeding with Dr. Pilling's patient"; and (2) that Mr. Gallegos had received ineffective assistance of trial counsel based upon Mr. Haley's failure to request that the trial court conduct an in camera proceeding as set forth above. (Gallegos Aff. Attach. A at 11-12.)

In the underlying criminal case, the court granted Dr. Pilling's motion for a protective order based upon his invocation of the psychotherapist-patient privilege. See I.R.E. 503. There is nothing in Idaho Rule of Evidence 503, case law, statutes, or other rules that authorizes or requires a court to conduct an in camera proceeding in the manner that Mr. Gallegos suggests where the psychotherapist-patient privilege has been invoked. Where no such procedure exists under Idaho law, there is no legal basis for arguing or concluding that Mr. Haley's failure to request such a procedure is ineffective assistance of counsel. There is no legal basis for arguing or concluding that Mr. Gallegos's appellate attorneys provided ineffective assistance of counsel by failing to raise the issues on appeal that are set forth above.

(R., p. 44.) The district court also held that Gallegos' claim regarding his post-conviction counsel was not valid. (R., pp. 45-46.)

Gallegos' filed a Motion to Reconsider Appointment of Counsel. (R., pp. 60-66.) The district court denied the motion to reconsider, because Gallegos failed to present any new evidence, legal authority or argument. (R., p. 67-70.)

The district court issued a Notice of Intent to Dismiss Post-Conviction Application. (R., pp. 71-75.) The court gave notice that Gallegos' successive petition would be dismissed because he failed to articulate a sufficient reason to file a successive petition. (R., pp. 72-73.)

The only cited basis for allowing the Successive Petition in this case is the ineffective assistance of prior post-conviction counsel. Because this is not a "sufficient reason" for filing a successive petition, Mr. Gallegos's claims of ineffective assistance of counsel in the Successive Petition are barred by Idaho Code § 19-4908.

(R., p. 74.) The district court explained that, "[T]he Idaho Supreme Court recently held that because a post-conviction petitioner 'has no statutory or constitutional right to effective assistance of post-conviction counsel, [he or] she cannot demonstrate 'sufficient reason' for filing a successive petition based on ineffectiveness of post-conviction counsel.'" (R., p. 73 (citing Murphy v. State, 156 Idaho 389, 395, 327 P.3d 365, 372 (2014).)

Gallegos filed a reply. (R., pp. 76-82.) In the reply, Gallegos argued that Murphy violated federal law and was not yet a final decision. (Id.) Gallegos also repeated his request that he be appointed counsel. (R., pp. 76-82.) The district court rejected Gallegos' arguments and entered an order dismissing his successive petition. (R., pp. 83-88.) The district court stated:

In the Reply, Mr. Gallegos contends that the holding in *Murphy* "is contrary to clearly established Federal law as determined by the U.S. Supreme Court and the Ninth Circuit." (Reply 3.) However, the law cited by Mr. Gallegos merely provides that "a state [post-

conviction relief] counsel's ineffective assistance in failing to raise trial-counsel [ineffective assistance of counsel] claims can excuse a procedural default" for the purposes of federal habeas review. *Detrich v. Ryan*, 740 F.3d 1237, 1240 (9th Cir. 2013) (citing *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309 (2012)). It does not establish that a petitioner has a constitutional right to the effective assistance of counsel in a state postconviction case. It has no bearing on the application of Idaho Code § 19-4908 to this case, nor is it contrary to the Idaho Supreme Court's holding in *Murphy*.

Mr. Gallegos also appears to request that this court not dismiss his Successive Petition based upon *Murphy* until the Idaho Supreme Court has the opportunity to consider an alleged petition for rehearing in that case. This request is denied.

(R., p. 86.) Gallegos timely appealed. (R., pp. 91-94.) The district court granted Gallegos' Motion for Appointment of Counsel On Appeal. (R., pp. 104-105.)

Gallegos' appellate counsel moved to withdraw. See Oct. 28, 2014 Motion for Leave to Withdraw and Oct. 28, 2014 Motion for Leave to Withdraw. This Court granted the Motion to Withdraw. See Nov. 21, 2014 Order Granting Motion to Withdraw as Counsel. Gallegos proceeded pro se and filed an opening brief.

ISSUE

Gallegos states the issues on appeal as:

Did the district court err in summarily dismissing the successive petition post-conviction relief given that the pleadings and supporting material established a genuine issues of material facts as to whether trial counsel was ineffective in failing to request an in camera proceeding with Dr. Pilling's patient inquiring into her knowledge of anything related to Petitioner's case; Petitioner's Appellate Attorney's were constitutionally ineffective in representing him in his appeal of the judgment and sentence; and, the district court abused its discretion contrary to this Court's holding in taking judicial notice of the underlying criminal records in the post-conviction proceedings?

(Appellant's brief, pp. 3-4)

The state rephrases the issues as:

Has Gallegos failed to show the district court erred when it summarily dismissed his successive post-conviction petition?

ARGUMENT

The District Court Properly Dismissed The Petition As Successive

A. Introduction

Gallegos alleged he is entitled to file a successive post-conviction petition because his first post-conviction counsel was ineffective. (R., p. 6.) The district court dismissed the successive petition because ineffective assistance of post-conviction counsel is not a sufficient reason to permit a successive post-conviction petition. (R., pp. 83-88.) The district court was correct. The district court did not err when it dismissed Gallegos' successive petition for post-conviction relief.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002).)

C. Gallegos Waived Any Appellate Challenge To The District Court's Order By Failing To Present Authority As To Why His Petition Is Not Barred As Successive

While Gallegos acknowledges the district court's reliance on Murphy (Appellant's brief, p. 3) Gallegos fails to present any legal authority or argument why Murphy does not control. "A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking." State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Instead, Gallegos re-argues the

claims contained in the successive petition, and argues that he should have been appointed successive post-conviction counsel. (See Appellant's brief, pp. 4-12.) Gallegos failed to argue that Murphy does not apply and failed to provide legal authority to show that he is entitled to file a successive post-conviction petition. (See Appellant's brief, pp. 4-12.). Because Gallegos failed to present any argument or authority challenging the legal bases for the district court's summary dismissal of his petition, he has waived any appellate challenge to that dismissal.

D. Gallegos' Petition Was Properly Dismissed As Successive

Even if the merits of the district court's dismissal of the successive petition are considered, application of the correct legal standards shows no error. Idaho law provides that grounds "finally adjudicated or not ... raised" in an initial or amended petition for post-conviction relief generally "may not be the basis for a subsequent application." I.C. § 19-4908. Only where the petitioner can show "sufficient reason" why claims were "not asserted" or "inadequately presented in the original" case may he pursue a successive petition. Id.; Griffin v. State, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006) (citation omitted). Ineffective assistance of post-conviction counsel does not constitute "sufficient reason" for filing a successive petition. Murphy, 156 Idaho at 391, 327 P.3d at 367.

It is undisputed that the Gallegos' petition is successive. (R., pp. 1-7 ("Successive Petition for Post-Conviction Relief").) Gallegos alleged that he had a sufficient reason to file a petition for post-conviction relief due to ineffective assistance of post-conviction counsel. (R., p. 6.) Gallegos alleged:

Petitioners sufficient reason for successive petition for post-conviction relief is due to ineffective assistance of post-conviction relief counsel for failing to raise all cognizable claims of ineffective assistance of trial counsel.

(R., p. 6.) Because ineffective assistance of post-conviction counsel is not a basis for avoiding application of the statutory bar on successive petitions, the district court properly dismissed the petition as successive.

Even if the merits of Gallegos' successive claims are considered, the district court did not err. Gallegos' first claimed that his original post-conviction counsel was ineffective. (R., pp. 26-30.) The district correctly ruled that an applicant for post-conviction relief does not have a constitutional or statutory right to effective assistance of post-conviction counsel. (R., p. 45 (citing Rios-Lopez v. State, 144 Idaho 340, 343, 160 P. 3d 1275, 1278 (Ct. App. 2007).) Gallegos' second claim was that his trial counsel was ineffective. (R., pp. 31-35.¹) In the underlying criminal case, Gallegos sought information from a psychologist, but the district court granted the psychologist's motion for a protective order. (R., pp. 44-45.) Gallegos alleged his criminal counsel was ineffective for not then asking the court to conduct an in camera interrogation of the psychologist. (Id.) In this post-conviction case, the district court ruled the type of in camera questioning suggested by Gallegos is not supported by law. (Id.) Therefore, his criminal counsel was not ineffective for failing to ask for such a procedure. (Id.) Gallegos' third claim was that his appellate counsel was ineffective for not raising the same issue on appeal. (R., pp. 36-40.) The district court correctly ruled that


¹ This claim is also likely time barred. See I.C. § 19-4902; State v. Green, 156 Idaho 722, 724, 330 P. 3d 1080, 1082 (Ct. App. 2014).

Gallegos's appellate counsel was not ineffective for refusing to bring his baseless argument on appeal. (R., pp. 44-45.) The district court did not err when it summarily dismissed Gallegos' successive petition.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment.

DATED this 23rd day of March, 2015.




TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of March, 2015, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Andy Gene Gallegos
IDOC No. 26591
ISCI Medical Annex
PO Box 14
Boise, ID 83707



TED S. TOLLEFSON
Deputy Attorney General

TST/pm